SUPREME COURT, U. S.

Supreme Court
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IN THE

Supreme Court of the United States

October Term, 1971
No. 70-246

DONALD RICHARD GOULET,

Petitioner,

vs.

MUNICIPAL COURT OF PASADENA JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Statement.

A guilty plea is "a grave and solemn act" which waives certain constitutional rights, and therefore must not only "be voluntary but must be knowing, intelligent" and "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748. Since it is a part of a lawyer's obligation to prepare his client to enter a knowing, intelligent plea, petitioner contends that the advise of his original counsel to plead *nolo contendere* was not "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 771. Petitioner contends that his plea was not voluntarily and intelligently made in contemplation of law, and was therefore voidable under the Constitution and the interpretive decisions of this Court.

Respondent's opposition to the writ of certiorari fails to meet the substantial constitutional issues here presented and respondent's arguments reveal an undisputed record so far as the decisive issues here presented are concerned.

1. It is not disputed that the charge against petitioner was the knowing exhibition of a motion picture film in violation of the state obscenity statute, and that the attorney for the petitioner at the time the plea of *nolo contendere* was submitted had never seen the film.

The respondent emphasizes the seizure of the motion picture film by police officers without any prior adversary hearing and stresses that there was a "viewing by the Vice officers" (Resp. Opp., p. 2), and that there was also a "personal viewing" by the judge who issued the search warrant for the seizure of the film (*Id.*, p. 2). But despite the fact that the vice officers had viewed the film, and the judge had viewed the film, the attorney for the petitioner never saw the film and nevertheless advised petitioner to enter his plea to a charge of exhibiting an "obscene" motion picture film. (See, Decl. of Howard Gershan (Pars. 3-6); Pet. for Writ, App. D).

2. Prior to the entry of the plea petitioner was not advised by his counsel "of the strong probability that the search and seizure involved in his case was violative of constitutionally guaranteed rights" in that there was no prior adversary hearing before seizure (Decl. of Howard Gershan (Pars. 8-9); Pet. for Writ, App. D).

Respondent therefore spends considerable time in its opposition papers endeavoring to establish that the seizure of the film was not violative of the Constitution,

emphasizing that a prior adversary hearing was not constitutionally required (Resp. Opp., pp. 5-10).

Nevertheless, it is plain that the seizure of the motion picture film which was made without any prior adversary hearing was contrary to the Constitution and the applicable decisions of this Court. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrants of Property*, 367 U.S. 717. The requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed dissemination of nonobscene expression. See, *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d ..... (2 Cir.) Docket No. 33997, cert. denied 90 S. Ct. 941; *United States v. Alexander*, 428 F. 2d 1169 (8 Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7 Cir. 1968); *Demich, Inc. v. Ferdon*, 426 F. 2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

Yet petitioner was never advised by counsel of these substantive rights prior to plea.

3. It is not disputed that the time between the date of sentencing and the time when petitioner moved the Court to withdraw his plea and to enter a plea of not guilty was approximately 10 days, and a month before the date of sentence. It is therefore plain that no compelling state interest existed to justify a denial of petitioner's application for leave to withdraw his plea.

The inconvenience to court and prosecutor was minimal, while on the other hand petitioner had been advised by counsel to plead guilty to an obscenity charge without any viewing of the film by counsel and without any advice with respect to his rights against the patently illegal seizure of the film.

4. It is argued by respondent that this Court is bound by the state court judgments with respect to the issue of the effective assistance of counsel (Resp. Opp., pp. 18-19). This Court has held, however, that "We must 'make an independent examination of the whole record', . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion" into areas protected by the Constitution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285. See also, *Chambers v. Florida*, 309 U.S. 227, 228-229; *Haynes v. Washington*, 373 U.S. 503, 515-516.

Conclusion.

Respondent's opposition only emphasizes the deprivation of constitutional rights to which petitioner has been subjected as the result of the ineffective assistance of counsel. Petitioner has been subjected to criminal sanctions, despite his claim of innocence, without the protection and guarantees of constitutional rights which petitioner never voluntarily or understandingly waived. It is submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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